86 1695

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

ROBERT G. REIBOLDT, JR.,
Petitioner,

v.

STATE OF NEW JERSEY,
Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR
WRIT OF CERTIORARI

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Attorney for the Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner's right to counsel violated by the initial admission into evidence of the results of breathalyzer tests, which were given after the Petitioner was arrested and informed that he had no right to consult with counsel before taking the tests?

2. Were the Petitioner's due process rights violated by the initial admission into evidence of the results of the breathalyzer tests, as well as extensive testimony regarding those results, which, although later ruled inadmissible, obviously influenced the courts' decision, thereby prejudicing the Petitioner?

3. Were the Petitioner's due process rights violated by his conviction for driving under the influence of intoxicating liquor despite the lack of sufficient evidence to support a finding of guilt beyond a reasonable doubt?

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OPINIONS BELOW

The opinion and judgment of the Woodbridge Municipal Court, Middlesex County, New Jersey, finding the Defendant guilty was issued on October 25, 1985, and is set forth in the Appendix at A-10. The opinion and order of the Superior Court of New Jersey, Law Division--Middlesex County, affirming the judgment of the municipal court was issued on December 13, 1985, and is set forth in the Appendix at A-5. The opinion of the Superior Court of New Jersey, Appellate Division, affirming the judgment of the Law Division was filed on August 25, 1986, and is set forth in the Appendix at A-2. The Supreme Court of New Jersey denied the Defendant's petition for certification on February 27, 1987. A-1.

JURISDICTION

The order of the Supreme Court of New Jersey denying the defendant's petition for certification was entered on February 27, 1987 and filed on March 3, 1987. The jurisdiction of this court is invoked pursuant to 28 *U.S.C.* § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The sixth amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The fourteenth amendment provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law[.]"

STATEMENT OF THE CASE

The Petitioner, Robert G. Reiboldt, Jr., was issued a summons on January 10, 1985, for driving under the influence of intoxicating liquor (DUI) in violation of *N.J. Stat. Ann.* § 39:4-50(a) (West 1986). On that date, the Petitioner was involved in a minor traffic accident at approximately 8:45 p.m. on the Garden State Parkway. According to New Jersey State Trooper Fred Gasior, who observed the accident while driving about 50 yards behind the Petitioner, Reiboldt was traveling in the right-hand lane of the four-lane highway when his car veered left across two lanes and lightly struck a vehicle in the far left-hand lane of the highway. Following the accident, the trooper pulled Reiboldt's vehicle off onto the right-hand shoulder of the highway and pulled his vehicle up behind Reiboldt's. The trooper testified that he observed Reiboldt exit his car and stumble two steps backward into the slow lane of the highway, and then walk to the trooper's car while leaning on his own car with his left hand. The trooper also stated that when Reiboldt reached him and began talking, he noticed a strong odor of alcohol on Reiboldt's breath, and that Reiboldt's eyes were bloodshot, and he was swaying and leaning for balance. At this point, based solely on the above circumstances, the trooper formed an opinion that Reiboldt was under the influence of alcohol, placed him under arrest, and advised him of his *Miranda* rights. Reiboldt was then placed in the back of the troop car and taken to the State Police Barracks in Bloomfield.

When the trooper and Reiboldt arrived at the barracks, the trooper again informed Reiboldt of his *Miranda* rights and also read him paragraph 36 of the New Jersey State Police Drinking Driving Report which outlines a driver's rights under the Implied Consent Law pertaining to the taking of breath samples for the purpose of conduct-

ing breath tests. A-15. Paragraph 36 provides in part that the *Miranda* warnings do not apply to the taking of breath samples and do not give the accused the right to refuse to give breath samples; also, that the accused has no legal right to consult with an attorney or anyone else, or have anyone present, for purposes of taking the breath samples. Reiboldt then consented to the taking of a breathalyzer test. Two breathalyzer tests were then administered to Reiboldt which both registered a reading of .20% blood alcohol. Also, in the course of administering the breathalyzer tests, the trooper asked Reiboldt several questions including whether he had had any alcoholic drinks to which Reiboldt replied that he had about four beers. When asked when he had these drinks, Reiboldt replied: at approximately 3:30 p.m. to 5:00 p.m. After the breathalyzer tests were administered, Reiboldt was issued a summons for DUI and then released.

On October 25, 1985, a non-jury trial was held in the municipal court on the DUI charge against Reiboldt. Immediately prior to trial, the Defendant made a motion to suppress the results of the breathalyzer tests and the Defendant's answers to questions asked in conjunction with the administering of the tests based in part on the denial of access to counsel prior to and during the breathalyzer tests, the inconsistency between the *Miranda* rights and the rights under the Implied Consent Law, and a defect in the breathalyzer machine which consisted of a small hole in the bore hose. A-12. Following argument, the municipal court denied the motion to suppress. A-13.

Trial then commenced at which extensive testimony was admitted concerning circumstances surrounding the administering of the breathalyzer tests as set forth above, as well as the test results themselves.

Following the reception of evidence, the court ruled

that due to the small bore hole in the breathalyzer machine, there was some doubt as to the accuracy of the test results. The court ruled, therefore, that it would not place any weight on the test results. The court then found the Defendant guilty of driving under the influence in violation of *N.J.S.A.* § 39:4-50.

The Defendant appealed his conviction to the Law Division, which affirmed the municipal court's judgment, stating that it did not rely on the breathalyzer tests in making its decision. The court held that the instructions given to the Defendant under the Implied Consent Law were clear and proper and that the Defendant had no right to an attorney when the breathalyzer test was administered. The court further found that the evidence was sufficient to convict the Defendant.

On appeal, the Superior Court affirmed and the Supreme Court of New Jersey denied the Defendant's petition for certification.

ARGUMENT

I. THE PETITIONER'S RIGHT TO COUNSEL WAS VIOLATED BY THE INITIAL ADMISSION INTO EVIDENCE OF THE RESULTS OF THE BREATHALYZER TEST WHICH WAS GIVEN AFTER THE PETITIONER WAS ARRESTED AND INFORMED THAT HE HAD NO RIGHT TO CONSULT WITH COUNSEL BEFORE TAKING THE TEST.

This case presents an important federal constitutional issue on which the states are split. This issue is whether the right to counsel covers the stage at which a driver ar-

rested for drunk driving must decide whether to consent to a blood alcohol test. Many states which have considered this issue have rejected the argument that the sixth amendment right to counsel covers this stage. *See Nyflot v. Minnesota Commissioner of Public Health*, 106 S. Ct. 586 (1985) (White, J, with whom Stevens, J., joined, dissenting from the dismissal of the appeal for want of a substantial federal question); *Sites v. State*, 300 Md. 702, 481 A.2d 192 (1984) (collecting cases). Some states, however, have found that the sixth amendment right to counsel does extend to this stage. *E.g.*, *State v. Welch*, 135 Vt. 316, 376 A.2d 351 (1977) (superseded by state statutory right to counsel, *see State v. Duff*, 136 Vt. 537, 394 A.2d 1145 (1978)); *see also Heles v. South Dakota*, 530 F. Supp. 646 (D.S.D.), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982). Other states have found a right to counsel based on state law, *see, e.g., State v. Fitzsimmons*, 93 Wash. 2d 436, 610 P.2d 893 (1980), *vacated on other grounds*, 449 U.S. 977, aff'd on remand, 94 Wash. 2d 858, 620 P.2d 999 (1980), or on general due process guarantees, *see*, e.g., *Sites v. State*, *supra*; *State v. Newton*, 291 Or. 788, 636 P.2d 393 (1981). Given these varying results and the importance this issue has gained in recent times due to the increased enforcement and severity of drunk driving laws, this Court should settle the question at this time.

Furthermore, this case presents other federal constitutional questions which must be resolved by this Court in order that justice may be served. Therefore, the acceptance of this petition would afford the Court an opportunity to settle an important and current federal constitutional question, as well as insure that justice is served in this case.

A. THE PETITIONER HAD A SIXTH AMENDMENT RIGHT TO COUNSEL AT THE STAGE AT WHICH HE WAS FORCED TO DECIDE WHETHER OR NOT TO CONSENT TO TAKE A BREATHALYZER TEST.

As this Court has recently stated, "[t]he right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensible to the fair administration of our adversarial system of criminal justice." *Maine v. Moulton*, 106 S. Ct. 477, 483 (1985) (footnote omitted). Based on the "obvious truth" that the average defendant does not have the professional legal skill to protect himself, *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938), the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding. *Maine v. Moulton, supra*, 106 S. Ct. at 484.

This Court has long recognized that the right to counsel extends not simply to assistance at trial, but also to all other "critical" stages of the proceedings against a defendant in which the results "might well settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Wade*, 388 U.S. 218, 224 (1967). The point at which an accused is forced to decide whether to consent to a breathalyzer test is a "critical stage" in the prosecution of a drunk driving case, at which time the right to counsel attaches. At this point in such a prosecution, formal charges will almost certainly be brought regardless of the results of the breathalyzer test. Moreover, if the accused chooses not to submit to the test, such refusal will result in the bringing of charges based on the refusal, as well as, almost certainly, criminal charges for DUI. Thus, the state should not be able to evade the sixth amendment right to counsel by simply issuing a summons or citation, which constitutes

the "formal" charges, only after forcing the accused to choose whether to submit to the test. *See Moran v. Burbine*, 106 S. Ct. 1135 (1986). The accused is, in essence, charged with DUI when he is arrested for DUI and taken to the police station for a chemical sobriety test.

The decision whether to submit to a breathalyzer test is the most important stage of the drunk driving prosecution. Various courts have recognized that this choice is one which will have a substantial and irreversible impact on the subsequent trial. *See Prideaux v. State Department of Public Safety*, 310 Minn. 405, 247 N.W.2d 385 (1976); *Forte v. State*, 686 S.W.2d 744 (Tex. Ct. App. 1985), *rev'd*, 707 S.W.2d 89 (Tex. Crim. App. 1986). If the accused submits to the test and is in fact legally intoxicated, the chance of winning the criminal case is virtually nonexistent. *See* Comment, "Public Outcry v. Individual Rights: Right To Counsel And The Drunk Driver's Dilemma," 69 *Marq. L. Rev.* 278 (1968). In New Jersey, as in many other states, penalties for DUI convictions include heavy fines and imprisonment, revocation of the driver's license and mandatory sentences. *See N.J.S.A.* § 39:4-50. If the accused refuses a breathalyzer test, loss of license ensues. *N.J.S.A.* § 39.4-50.4a. Furthermore, many states, including New Jersey, permit a refusal to submit to a test to be introduced as evidence in trial against the defendant. *See State v. Tabisz*, 129 N.J. Super. 80, 322 A.2d 453 (App. Div. 1974). The only way an accused can make an intelligent decision regarding submission to a chemical sobriety test is through the advice and counsel of an attorney.

A determination that the point at which an accused is forced to decide whether to consent to a chemical test is a critical stage would be consistent with past decisions of this Court in which the concept of "critical stage" has been discussed.

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court observed that it has identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. The point at which an accused must decide to submit to a chemical sobriety test certainly meets this standard. One who has been accused of DUI and has been asked to submit to a chemical sobriety test has certain rights which may be lost if left unguided by counsel. *See State v. Fitzsimmons, supra.* The possible consequences of a driver's decision whether to submit to a chemical test clearly affect the merits of the defense, thereby making the decision a critical stage according to the reasoning in *Gerstein v. Pugh, supra.*

Although this Court, in *Kirby v. Illinois*, 406 U.S. 682 (1972), stated in a plurality opinion that the right to counsel does not attach until the accused has been formally charged, *Kirby* dealt solely with pretrial identification procedures and should not be extended to the situation presented here. Furthermore, as the court in *State v. Welch, supra*, stated, "[e]ven if given a broader interpretation, *Kirby* still adheres to the established position that it is necessary in all cases to scrutinize any pretrial confrontation to ensure the fairness of the procedures in light of an accused's right to due process of law." 376 A.2d at 354.

The essence of the "critical stage" test from *United States v. Wade, supra*, is whether "potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." 388 U.S. at 227. Applying this test to the situation presented here indicates that the point in time when an accused is requested to submit to a chemical sobriety test is a "critical stage" in the prosecution of a DUI charge. The decision which is made will be crucial to the accused's future handling of the case. Rights may be lost and poten-

tial defenses may become irretrievable. Clearly, possible prejudice is demonstrated in this situation.

As the court stated in *Forte v. State*, *supra*, in the usual case of a suspected drunk driver who has been taken into custody:

> He has been informed that he has the right to remain silent and has the right to consult an attorney, and he has been informed that his operator's license can be suspended if he refuses to give a specimen of his breath or blood. He is placed on the horns of a dilemma—he has been told he may remain silent and consult an attorney, and in the same breath is required to answer a question which has significant results. If he refuses, he knows his license may be suspended and the fact that he refused can be used as evidence against him in his trial. If he consents and the test reveals an alcohol content in his blood of 0.10% or more, he is automatically guilty of driving while intoxicated. Even if the test results show less than 0.10% concentration of alcohol, there is no guarantee that he will not be tried for the offense of public intoxication, or driving while intoxicated by reason of the fact that his mental or physical faculties were impaired. It stretches reason to say this is not a critical stage of the pretrial proceeding.

686 S.W.2d at 753-54.

No state has provided for mandatory testing of suspected drunk drivers. *See* Comment, *supra*, 69 *Marq. L. Rev.* at 288-89. It is noted that although New Jersey courts have held that there is no legal right to refuse to submit to a breath test, *State v. DeLorenzo*, 210 N.J. Super. 100, 509 A.2d 238 (App. Div. 1986), the New Jersey implied consent statute expressly provides that the police shall *request* the driver to submit to a test and that no chemical test may be forcibly given. *N.J.S.A.* § 39:4-50.2. Accordingly, the legislature has allowed the driver to make a choice. Since the state legislature has seen fit to give the accused a choice which may well irrevocably affect his future rights, the sixth amendment requires that he be allowed to consult with counsel in order to make an informed, intelligent decision. The choice offered by the state legislature may be rendered meaningless without the guidance of counsel at this critical stage.

The question of whether or not to take the test may, depending upon the fact and circumstances of each case, have a very real bearing upon whether a person is or is not convicted of DWI, does or does not lose his license and suffers the penalty of a heavy fine or jail sentence. Only an attorney, with the full knowledge of the facts gained from his client, can weigh the factors of each case and make a proper decision. *City of Dayton v. Nugent*, 25 Ohio Misc. 31, 265 N.E.2d 826, 832 (1970).

Therefore, the point at which an accused must decide whether to consent to a chemical sobriety test is a critical stage at which the sixth amendment right to counsel attaches.

B. THE PETITIONER HAD A DUE PROCESS RIGHT UNDER THE FOURTEENTH AMENDMENT TO CONSULT WITH COUNSEL BEFORE MAKING THE DECISION WHETHER TO SUBMIT TO A BREATHALYZER TEST.

The due process clause of the fourteenth amendment has long been recognized as a source of a right to counsel independent of the sixth amendment where critically important to the fairness of the proceedings. *Sites v. State*, *supra*, 481 A.2d at 199. The due process right "is one that assures that convictions cannot be brought about in criminal cases by methods which offend a sense of justice." *Id.* By affording a suspect the power to refuse chemical testing, New Jersey's implied consent statute deliberately gives the driver a choice between two different potential sanctions, each affecting vitally important interests. *See id.* "Indeed, revocation of a driver's license may burden the ordinary driver as much or more than the traditional criminal sanctions of fine or imprisonment." *Id.* at 199-200. The continued possession of a driver's license may be essential to earning a livelihood; as such, it is an entitlement which cannot be taken without due process mandated by the fourteenth amendment. *See Dixon v. Love*, 431 U.S. 105 (1977); *Bell v. Burson*, 402 U.S. 535 (1971). Thus, to deny a defendant access to a lawyer before deciding whether to take a chemical sobriety test would be inconsistent with the due process demands of the fourteenth amendment. *Heles v. South Dakota*, *supra*.

The dilemma facing the driver who has been arrested for DUI and is requested to take a chemical sobriety test has been set forth in the preceding section. As the court stated in *Sites v. State*, *supra*, "[c]onsidering all the circumstances, we think to unreasonably deny a requested

right of access to counsel to a drunk driving suspect offends a sense of justice which impairs the fundamental fairness of the proceeding." 481 A.2d at 200.

In addition, as occurred in this case, a driver arrested for DUI is initially given his *Miranda* rights at the time of his arrest. *See Berkemer v. McCarty*, 468 U.S. 420 (1984). Then, when he is asked to consent to a chemical sobriety test, the driver is told that his *Miranda* rights are not applicable and he may not consult with counsel before making his decision. Such an apparent contradiction can only cause the driver to be confused about what rights he actually has. *See Heles v. South Dakota*, *supra*; *Graham v. State*, 633 P.2d 211 (Alaska 1981); *Rust v. Department of Motor Vehicles*, 267 Cal. App. 2d 545, 73 Cal. Rptr. 366 (1968). "It must be impossible for the driver, forced to make an immediate decision which later may be used to convict him or her of a crime, to reconcile these contradictions." *Heles v. South Dakota*, *supra*, 530 F. Supp. at 651. To force the driver to make such a choice in this situation is inconsistent with the due process demands of the fourteenth amendment. *See id.*

Therefore, based on the foregoing, the due process clause of the fourteenth amendment requires that a person arrested for drunk driving and requested to submit to a chemical sobriety test be permitted a reasonable opportunity to communicate with counsel before submitting to the test.

C. THE DENIAL OF THE PETITIONER'S CONSTITUTIONAL RIGHT TO COUNSEL WAS PREJUDICIAL ERROR.

Both the municipal court and the Law Division expressly ruled that the Defendant had no constitutional right to counsel before deciding whether to consent to the breathalyzer test. Although the results of the breathalyzer tests administered to the Defendant were eventually ruled inadmissible, extensive testimony was admitted concerning their results and the circumstances surrounding how they were administered due to the court's holding that the Petitioner had no right to counsel at this point. As will be discussed in the next section, the admission of this testimony was prejudicial in that despite ruling that the results of the tests were inadmissible, the court appears, nevertheless, to have considered those results in finding the Defendant guilty. Moreover, statements made by the Defendant in conjunction with the request to submit to the test were not excluded and were prejudicial.

Furthermore, without the breathalyzer test the evidence against the Defendant was weak, at best. Had the Defendant been allowed to consult with counsel before submitting to the breathalyzer test, it is possible that he could have secured exculpatory evidence, including an accurate breathalyzer test reflecting his true blood alcohol content. *See City of Tacoma v. Heater*, 67 Wash. 2d 733, 409 P.2d 867 (1966); *Brosan v. Cochran*, 307 Md. 662, 516 A.2d 970 (1986); *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971). Thus, even though the results of the breathalyzer tests were eventually ruled inadmissible, the denial of the Petitioner's right to counsel permitted otherwise inadmissible evidence to be admitted, and seriously hampered the Petitioner's defense. Therefore, the denial of the Petitioner's constitutional right to counsel was

prejudicial error.

II. THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE LOWER COURTS' CONSIDERATION OF THE RESULTS OF THE BREATHALYZER TESTS WHICH HAD BEEN RULED INADMISSIBLE.

Although it is well settled that in a non-jury trial the court is presumed to ignore inadmissible evidence and consider only properly admitted and relevant evidence in rendering its decision, *Harris v. Rivera*, 454 U.S. 339 (1981); *United States v. Joseph*, 781 F.2d 549 (6th Cir. 1986), this presumption of regularity is inapplicable where it is plain that the court, in finding the defendant guilty, has relied on evidence that it had previously declared inadmissible. *United States v. Joseph*, *supra*. In the instant case, although both the municipal court and the Law Division held that the results of the breathalyzer tests were inadmissible and would not be considered in making their final determination as to guilt or innocence, the circumstances surrounding the courts' rulings and the lack of other evidence sufficient to find the defendant guilty indicate that the courts did, in fact, consider the results of the breathalyzer tests in making their determination and that the Defendant was thereby prejudiced and denied a fair trial.

Prior to trial before the municipal court, the court denied the Defendant's motion to suppress the results of the breathalyzer tests. At trial, after extensive testimony was heard concerning the administering of the tests and their results, the court ruled that due to a defect in the

breathalyzer machine, the test results were inadmissible and would not be considered. However, due to the high readings registered by the breathalyzer tests and the extensive testimony heard concerning the tests, it appears that despite its rulings, both the municipal court and the Law Division considered the results of the tests in arriving at their decisions. *See United States v. Joseph, supra.*

The situation presented here is analogous to that presented in *United States ex rel. Spears v. Rundle*, 268 F. Supp. 691 (E.D. Pa. 1967), *aff'd*, 405 F.2d 1037 (3d Cir. 1969) and *United States ex rel. Owens v. Cavell*, 254 F. Supp. 154 (M.D. Pa. 1966), where the district courts ordered new evidentiary hearings because a separate determination of the voluntariness of the defendants' confessions had not been made at their bench trials. Both courts reasoned that due process required a separate hearing to determine the voluntariness issue even for a bench trial because once the judges had heard evidence of guilt it was impossible for them to determine the voluntariness issue objectively and reliably as required.

Similarly, in the instant case, once the court heard the extensive testimony concerning the results of the breathalyzer tests, and the testimony of the state trooper that the defect in the machine would cause a false low reading, it was impossible for the court to determine the Defendant's guilt objectively and reliably without being influenced by the inadmissible results of the tests. Because of this, the Petitioner was deprived of a fair trial as guaranteed by the fourteenth amendment. *See United States v. Mendel*, 746 F.2d 155 (2d Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985) (in which the court held that the defendant was denied a fair trial because the judge at the bench trial at first ruled certain evidence inadmissible but later, without giving the defendant a chance to respond to the evidence, ruled it admissible and relied in part on that

evidence in determining guilt, although stating that he was confident that he would have come to the same conclusion without hearing that evidence). Therefore, the Petitioner is entitled to a new trial. *See id.*

III. THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY HIS CONVICTION FOR DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR DESPITE THE LACK OF SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT.

The applicable constitutional standard required by the due process clause of the fourteenth amendment for reviewing the sufficiency of the evidence to support a criminal conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). This test applies to both jury and bench trials. *United States v. Joseph*, *supra*. This standard has not been met in this case. *See State v. Grant*, 196 N.J. Super. 470, 483 A.2d 411 (App. Div. 1984).

According to the municipal court, the evidence it relied on to find the Defendant guilty consisted of the following: the Defendant's car veered across two lanes to his left and struck a car; the Defendant showed no signs of being injured and did not request medical treatment; when the Defendant got out of his car he was leaning on it and stumbled backward into a portion of the highway; he had a strong odor of alcohol and continued swaying, lean-

ing for balance and sagging at the knees; his eyes were bloodshot; and he was very talkative in the troop car while being transported to the barracks and continued to emit a strong odor of alcohol. These factors, while suspicious in combination, are each consistent with innocent behavior.

Although the sudden veering was unexplained, a number of innocent reasons may have been responsible, for example, a pothole or an animal on the road; or the Defendant may have fallen asleep, which would account for his reluctance to explain his action. After the Petitioner had been pulled over onto the shoulder, his unsteady gait, stumbling and leaning may be explained by the darkness, the uneven condition of the shoulder of the highway, and his general nervousness. Nervousness could also explain his talkativeness in the troop car. Tiredness could not only explain the Petitioner's sudden veering but also his bloodshot eyes and unsteady gait. The odor of alcohol may have been caused by the consumption of one beer earlier in the day or alcohol spilled on the Petitioner's clothing. Thus, the evidence relied on by the court is not inconsistent with innocence.

Furthermore, it must be remembered that no field sobriety tests were performed and no videotape was made, the Petitioner was at all times cooperative, polite and coherent, and, although the trooper had been traveling behind the Petitioner, there is no evidence of erratic driving except for the one instance of veering. This lack of evidence also supports the view that the Petitioner's actions did not suffice for a finding of guilt.

The case law in New Jersey indicates that more evidence is needed to convict for DUI than that presented here. For example, in *State v. Tabisz*, *supra*, in addition to evidence similar to that presented here, there was also evidence that the defendant refused to take a breathalyzer

test, that he was unable to complete the finger-to-nose test and was generally uncooperative in performing other requested routine movements to test his coordination, and that he admitted that he had four drinks before dinner.

In *State v. McGeary*, 129 N.J. Super. 219, 322 A.2d 830 (App. Div. 1974), the additional evidence to that presented here consisted of the following: the defendant had difficulty finding his driver's license in his wallet until it was pointed out to him by the officers; in response to a question as to how much he had been drinking, the defendant responded "too much"; he did not know where he was; he unsatisfactorily performed various physical tests; and he was uncooperative.

In *State v. Higgins*, 132 N.J. Super. 67, 332 A.2d 220 (App. Div. 1975), the additional evidence to that presented here included erratic driving by the defendant which took place several times, a lengthy time needed to produce his driver's license, an unsuccessful effort to find his vehicle registration, the defendant's admission that he had had a few beers, his inability to perform the heel-to-toe test and his refusal to take a breathalyzer test.

In *Gustavson v. Gaynor*, 206 N.J. Super. 540, 503 A.2d 340 (App. Div. 1985), a civil case, it was noted that swerving into another lane was not to be considered to be such reckless driving as to constitute the necessary supplementary evidence warranting the admission of the driver's blood alcohol content. Certainly, then, such evidence would not be sufficient to prove a defendant guilty of DUI beyond a reasonable doubt.

Accordingly, the foregoing cases indicate that the evidence presented in the instant case was insufficient to find the Defendant guilty beyond a reasonable doubt. Therefore, the Petitioner's due process rights were vio-

lated by his conviction. *See Jackson v. Virginia, supra.*

CONCLUSION

For the foregoing reasons, the Petitioner, Robert G. Reiboldt, Jr., respectfully requests this Court to grant this petition and issue a writ of certiorari to the Supreme Court of New Jersey.

Respectfully submitted,

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86 1695

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APPENDIX

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SUPREME COURT OF NEW JERSEY

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STATE OF NEW JERSEY
Plaintiff-Respondent,

vs.

ROBERT G. REIBOLDT, JR.,
Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1984-85T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 27th day of February, 1987.

CLERK OF THE SUPREME COURT

DECISION FILED AUGUST 25, 1986

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1984-85-T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT G. REIBOLDT, JR.,

Defendant-Appellant.

Submitted: August 12, 1986 – Decided: August 25, 1986

Before Judges Baime and Ashbey.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County

Emanuel Gersten, attorney for appellant.

Alan A. Rockoff, Prosecutor, Middlesex County, attorney for respondent (Simon Louis Rosenbach, Assistant Prosecutor. of counsel, Stuart Santiago on the brief).

PER CURIAM

On October 25, 1985 defendant was found guilty in municipal court of driving while under the influence of intoxicating liquor in violation of *N.J.S.A.* § 39:4-50. This conviction was affirmed by the Law Division. Plaintiff appeals and we affirm.

On January 10, 1985 State Trooper Gasior witnessed a motor vehicle accident on the Garden State Parkway. He saw defendant's car strike the passenger side of another car and continue traveling. When Gasior brought defendant's car to a halt, he saw defendant get out of the car and stumble backward onto the highway. Defendant leaned on the car as he walked toward the trooper. Gasior smelled alcohol on defendant's breath and made observations concerning defendant's physical condition, including his slurred speech and his lack of balance. Defendant was placed under arrest and given his *Miranda* [*Miranda v. Arizona*, 384 U.S. 436 (1966)] warnings. On the ride back to headquarters Gasior had further opportunity to observe defendant. He testified it was his opinion defendant was under the influence of alcohol.

At 9:30 p.m. and at 9:50 p.m. defendant's breathalyzer tests were reported to indicate a blood alcohol content of .20 percent. These tests were not considered in the municipal court because the judge found the results unreliable "in that there was a small bore hole" in the unit. Both judges, however, referred to the results of the tests in observing that neither would rely upon them in deciding the case.

On appeal defendant contends that the conviction was not supported by the evidence. He also urges that the recitation of the results of the breathalyzer test by the Law Division judge (even though disregarded by the fact

finder) represented prejudice which could not be cured.

There is no merit to either contention. Evidence was unrefuted that the defendant drove in a dangerous, erratic manner. His motor coordination, manner of speech and smell of alcohol justified the trooper's conclusion that he was under the influence without the necessity of psychomotor tests or tests for alcohol. The findings of the Law Division judge are supported by credible evidence properly admitted and therefore must be respected. *State v. Johnson*, 42 *N.J.* 146, 162 (1964).

We further find no prejudice in the court's references to the excluded tests. In nonjury trials the judge's reference to excluded evidence does not necessarily prejudice appellant's rights. *See State in the interest of R.B.*, 200 *N.J. Super.* 573, 577 (App. Div. 1985).

Affirmed.

ORDER DATED DECEMBER 13, 1985

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STATE OF NEW JERSEY

VS.

ROBERT G. REIBOLDT, JR.

DEFENDANT.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
MIDDLESEX COUNTY
APPEAL NO. 269-85

ORDER

This matter having been presented to the Court by Emanuel Gersten, attorney for the defendant on appeal from conviction of *N.J.S.A.* 39:4-50(a) in the Municipal Court of Woodbridge, County of Middlesex and State of New Jersey and Assistant Prosecutor Joanne M. Mongon appearing on behalf of the State; and

There being a trial de novo on the transcript and the Court having heard and considered this matter and for other good cause having been shown;

It is on this 13th day of December, 1985;

ORDERED that the defendant is guilty of having violated the provisions of *N.J.S.A.* 39:4-50(a) for which the Court imposed a $400 fine, $15 court costs and $7.75 as costs of this appeal and a $100 surcharge; and it is further

ORDERED that the defendant's driving privileges are hereby suspended for a period of one (1) year and the defendant is sentenced to 12 hours in the Intoxicated Driver's Resource Center, 10 day jail sentence suspended and 5 days community service, and it is further

ORDERED that all fines stayed for 10 days pending filing of appeal.

HONORABLE JOSEPH
SADOFSKI, J.S.C.

SUPERIOR COURT
LAW DIVISION DECISION

THE COURT: That's a two-problem question argument by the defense; one dealing with his constitutional issues. Insofar as the constitutional issues are concerned, the Court will make known his finding on the record, and those can proceed to the Supreme Court of the State of New Jersey.

I have found here that the Miranda warnings given by the policeman in the car sufficient under requirement of our law. Even though he made no acknowledgements, he understood.

I'm satisfied that he understood or should have understood his rights.

The implied consent rule is established by the law of this state. The constitutionality is without question. If it is to be argued, it is to be argued before another forum and not this one.

Now, regarding the instructions of the breathalyzer. Instructions of breathalyzers as established by this state are, I think, standard in nature. They may, in fact, be misleading in that in one effect, the Miranda rights say you have a right to an attorney. With regard to the breathalyzer, you do not have a right to an attorney. Our laws are not clear in all issues. I can read our statutes left and right but we will not – we will have arguments from attorneys throughout the State of New Jersey as to what certain laws mean.

I'm satisfied that the instructions are clear in that their intent is to advise the individual who's being requested for a --to take a breathalyzer test that he has no right to delay

such test and that he has no right to refuse such a test. It would --it would seem to me that the fact that an attorney be present in a breathalyzer test would be in a useless pendage.

Now, dealing further with the facts of this case, it is substantial or substantiated that the breathalyzer had been thrown out. I will not rely upon that in this decision for the sake of the record. We have testimony here from the trooper. Before breathalyzers came into mode and even in the time of their dispute, it is the physical observations and tests which were the determining factors of drunk-driving cases.

It is to be noted here that there were no psychomotor tests given by the trooper. The question then becomes, can the Court sustain a conviction for drunk driving based purely upon observation? I think that the answer must be yes, in this particular case. That answer must be yes in cases where the overwhelming portion of the observation can lead only to one conclusion. One reasonable conclusion that the defendant was, in fact, drunk while driving.

We have here a situation where the trooper was following the defendant's car down the Garden State Parkway, was in a position from 50 yards behind the car observing it driving down the Parkway and for no reason whatsoever nor no explanation, reason, since the date of the accident, the car veered two lanes over to the right and was involved in an accident with a car that was proceeding in the left, fast lane. Whereupon the trooper tried, indeed, to pull the car over. It took some distance for the car to be pulled over by the defendant. In fact, the trooper's testimony was, in fact, that he thought that the defendant was not going to pull his own car over voluntarily.

Then we have the cars parked alongside the road of

the Garden State Parkway whereby the defendant gets out of the car and proceeds to stagger in the traffic lane of the Parkway. The situation is testified to by the trooper and, frankly, known to all individuals of reasonable aptitude that it is dangerous to stand in a travel lane of the Garden State Parkway.

The defendant then proceeds unsteadily walking to the rear of the car between the trooper's car and his car with the assistance of the trooper to get him off the highway. Whereupon this trooper then observed a strong odor of alcohol and observed bloodshot eyes and droopy eyelids. He's leaning on the car. He's tripping over his feet. The individual is then placed in the trooper's car where a strong odor of alcohol is observed during the transport to the police barracks.

The defendant remains in a very talkative state, allbeit it's a possibility that it's nervousness on behalf of the defendant, but taking in the context of all the other physical observations in this case which amount to evidence, I think, that also is inclusive. We cannot take one of these items of evidence and separate them.

I think in order to determine the true facts of the case, we must take the observations in total to see if they accumulate to a reasonable degree of certainty.

I am satisfied in this case that the observations as listed by this Court accumulate well beyond a reasonable degree of certainty and affirm the judgment below finding the defendant guilty of drunk driving.

TRIAL COURT DECISION
Transcript 56-58

THE COURT: Having heard the evidence before the Court, it is clear to this trier of the facts that there was some discrepancy with regard to the breathalyzer testing in that there was a small bore hole with regard to the breathalyzer in use of the 900A unit, number 93147 at the time and accordingly with regard to the testing of the breathalyzer taken at the barracks, despite the testimony of the Trooper that that would be favorable to the defendant, I feel that it raises some doubt in my mind as to the accuracy of the breathalyzer itself. Therefore I will confine my findings with regard to this matter strictly to what occurred at the roadside up and to the time the defendant was placed under arrest for drunken driving, and I will not place any weight upon the breathalyzer unit itself. The testimony before the Court which is uncontested at this time, is that the defendant was traveling in the right lane of the highway in Woodbridge Township and for no apparent reason he veered across two lanes of travel to his left and struck a car in that lane on the right side, with his left side, the damage being testified to by the police officer being present there. With respect to that, the defendant did give no explanation whatsoever with regard to this erratic driving and in fact according to the Trooper, stated he had no memory with regard to how this occurred, other than the impact. The defendant was identified by the Trooper as the driver of that vehicle and this observation of the erratic driving of the defendant was observed by this trooper certainly within more than a reasonable distance as testified to. The defendant was then observed not being in any apparent need of medical treatment, never requested it, medical treatment and showed no signs of being injured when he exited from his car, at which time the Trooper observed him leaning on the car, unable to stand and upon getting close to him as he stumbled toward the Trooper

and actually stumbled into the portion of the traveled highway backward, the Trooper when confronting him at a close distance, had the strong alcoholic odor on the defendant's breath. The defendant continued swaying, leaning for balance, sagging at the knees, had bloodshot eyes and droopy eyelids and based upon all of these factors observed by the Trooper, as well as the fact that I stated before, that he did not remember anything regarding his erratic driving, which precipitated this whole matter. The defendant was read his Miranda Rights and advised he was being arrested for driving under the influence and while being transferred in the police vehicle, the defendant continued to emit a strong odor of alcohol in the trooper's car, while traveling to the Bloomfield barracks and his manner of being very talkative as the Trooper has testified to, was a factor again along with the many other factors which lead the Trooper to believe that this defendant was clearly under the influence at the time. I feel based upon this evidence, it is more than the necessary burden required by the State beyond a reasonable doubt and I feel that the defendant is truly guilty of the violation of driving while under the influence, a violation of 39:4-50 and I'm going to find him Guilty.

EXCERPT FROM MOTION TO SUPPRESS STATEMENT OF FACTS & LAW

1. The arrest and procedure reports filed by the trooper involved in this matter, the facts and circumstances described therein, show conclusively that the trooper violated the defendant's constitutional rights; he erred in his procedures in exacting statements, results of tests and evidence of alleged incriminating effect.

The trooper failed to properly and did concurrently advise the defendant of the safeguards enunciated in the case of Miranda v. Arizona 384 U.S. 436 (1966), with the "rights" under paragraph #36 of the "drinking-driving report" which were inconsistent and in conflict with each other; thereby leaving the defendant in a compelled and confused manner and defendant not in a position to properly understand his "rights".

The test requested under said paragraph #36 is unconstitutional in that it violates the 4th, 5th, 6th and 14th Amendments of the U.S. Constitution, which are also applicable to the States.

DENIAL OF MOTION TO SUPPRESS
Transcript 10-12

THE COURT: With regard to the argument on the constitutionality of the breathalyzer, clearly under Macy (phonetic) vs. Montrin (phonetic) 4043 U.S. 1, that the constitutionality was upheld; therefore, I'm going to overrule the objection with regard to that. Based upon your Implied Consent, it's clear and it's been a (indiscernible) here in the state of New Jersey as well as numerous and probably all the states throughout the United States, that there was the intent of the legislature with regard to this particular aspect of the motor vehicle statute, to give protection to the public from the dangerous threat of drunk drivers and notwithstanding limiting the rights of that drunk driver under those circumstances. . . . Accordingly, I overrule the objection with regard to the Implied Consent. Going further on with regard to the Miranda Warnings, under Berkimer vs. McCarty, it is clearly stated that the Miranda Warnings, effective from that date, of that case, must now be given when the questioning of a police officer changes from the point of interrogation to the point of custodial apprehension and that will be part of the case of the evidence to be put in and that will be determined at that time, unless you wish to have a voir dire at this time, in which instance we will put the police officer on and hear the arguments with regard to the Miranda. Otherwise, I will reserve decision on that pending the evidence put in before the Court. . . . Last but not least, regarding these small bore holes, hole or whatever it was in the particular breathalyzer machine, at the time, that is the aspect of the reading that would be testified to as to what effect it has on the machine, if any, when in fact it may prove to be favorable to your client and not unfavorable to your client, based upon the facts of the expert's testimony under the circumstances. That remains a factor to be heard under the case. Overall, the objection

is overruled, the case will proceed.

IMPLIED CONSENT STATUTE

39:4-50.2. Consent to taking of samples of breath; record of test;independent test; prohibition of use of force; informing accused.

(a) Any person who operates a motor vehicle on a public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood; provided, however, that the taking of samples is made in accordance with the provisions of this act and at the request of a police officer who has reasonable grounds to believe that such person has been operating a motor vehicle in violation of the provisions of R.S. 39:4-50.

. . . .

(c) In addition to the samples taken and tests made at the direction of a police officer hereunder, the person tested shall be permitted to have such samples taken and chemical tests of his breath, urine or blood made by a person or physician of his own selection.

(d) The police officer shall inform the person tested of his rights under subsections (b) and (c) of this section.

(e) No chemical test, as provided in this section, or specimen necessary thereto, may be made or taken forcibly and against physical resistance thereto by the defendant. The police officer shall, however, inform the person arrested of the consequences of refusing to submit to such test in accordance with section 2 of this amendatory and supplementary act. A standard statement, prepared by the director, shall be read by the police officer to the person under arrest.